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No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Does an employer which provides health insurance benefits for employees and their dependents discriminate against male employees in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing only limited coverage for pregnancy-related expenses incurred by male employees' wives? [a]

PARTIES

Petitioner, Newport News Shipbuilding and Dry Dock Company, and Respondent, the Equal Employment Opportunity Commission, were the only parties to the proceedings before the court below.[b] Newport News Shipbuilding and Dry Dock Company, a corporation, is a wholly-owned subsidiary of Tenneco Corporation, which is a subsidiary of Tenneco, Inc.

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[a] Subsidiary questions are:

(1) In enacting the Pregnancy Discrimination Act, did Congress overturn the rationale, as well as the holding, of this Court's decision in General Electric Co. v. Gilbert?

(2) In enacting the Pregnancy Discrimination Act, did Congress make it unlawful under Title VII for an employer to make *any* distinctions based on pregnancy, childbirth, or related medical conditions even if such distinctions are not prohibited by the sex discrimination bans found in Sections 703(a) and 704 of Title VII?

[b] The Chamber of Commerce of the United States and the Equal Employment Advisory Council also participated in the proceedings in the court below as *amici curiae* urging affirmance of the decision of the district court. The United Steelworkers of America, AFL-CIO-CLC, and John McNulty, Defendants in Civil Action No. 80-20-NN, did not participate in the proceedings in the court below.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The final opinion of the court below is an unreported one-paragraph *per curiam* opinion issued after rehearing *en banc*. It is reproduced at 1a (App.).[1] This *per curiam* opinion adopted the rationale set forth in the panel opinion, which is reported at 667 F.2d 448 and is reproduced at 2a-8a (App.). The amended opinion and order of the district court in Civil Action No. 80-20-NN is reported at 510 F. Supp. 66 and is reproduced at 9a-20a (App.). The district court's initial opinion and order in Civil Action No. 80-20-NN is reported at 24 Fair Empl. Prac. Cases 1363. The district court's final order in Civil Action No.

[1] References herein shall be in accordance with the following convention: to pages in the Appendix to the Petition for a Writ of Certiorari: —— (App.); to pages in the Joint Appendix: J.A. ——, to pages in the Petition for a Writ of Certiorari: Pet. ——; to pages in the Brief filed by Respondent in Response to Petition for a Writ of Certiorari: R. Br. ——.

80-237-NN, which is unreported, is reproduced at 21a (App.).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The final judgments of the court below were entered on June 22, 1982. The Petition herein was filed on September 10, 1982 and was granted on December 6, 1982.

STATUTES AND REGULATIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e, the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. Law 95-555, 92 Stat. 2076 (Oct. 31, 1978), and certain regulations and interpretive guidelines issued by the Equal Employment Opportunity Commission ("EEOC"). Pertinent provisions of Title VII and the EEOC's regulations and guidelines are set forth in their entirety at Pet. 2-6. The full text of the PDA is set forth at 50a-51a (App.).

STATEMENT OF THE CASE

Newport News Shipbuilding and Dry Dock Company [hereinafter, "the Shipyard"] is an employer subject to the provisions of Title VII. As a self-insurer, the Shipyard provides a Hospitalization and Medical-Surgical Plan [hereinafter, "the Plan"] for "all active, full-time, production, maintenance, technical and clerical areas' bargaining unit eligible employees" who have been on the payroll for three continuous months.[2] The Plan, established in 1951, covers eligible employees of both sexes, their spouses, and their unmarried children who are between the ages of 14 days and 19 years.[3] It has three

[2] The full text of a booklet describing the principal features of the Plan is reproduced at 24a-49a (App.).

[3] *See* 29a (App.). Coverage is extended to unmarried children over the age of 19 years under certain limited circumstances. *See* 30a (App.).

components—a Major Medical Component, a Medical-Surgical Component, and a Hospitalization Component. After exhaustion of a $100 per person per calendar year deductible, the Major Medical component of the Plan provides reimbursement for 80% of the reasonable and customary charges for all covered medical expenses, up to a lifetime maximum of $25,000 per person.[4] With specific exclusions and limitations, the Medical-Surgical component of the Plan provides reimbursement for 100% of the reasonable and customary charges for all surgical procedures. The Hospitalization component provides 100% reimbursement for the cost of a semi-private hospital room, intensive care unit, or coronary care unit for up to 120 days, plus 100% of the first $750 of the reasonable and customary charges for hospital services (including general nursing care, x-ray examinations, and drugs) and other necessary services while hospitalized, plus 80% of the charges for hospital services exceeding $750 to a maximum of 120 days.[5]

With respect to the normal pregnancies of female employees and the spouses of male employees alike, the Hos-

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[4] *See* 32a-34a (App.).

[5] The Plan provides limited coverage for, *inter alia*, oral surgery, injuries and illnesses treated in a hospital emergency room, mental care when the patient is not hospitalized, and spousal maternity benefits. *See* 37a-39a (App.). By virtue of its "Coordination of Benefits" provisions, the Plan also limits reimbursements for expenses covered by Medicare and limits dependent coverage by providing that expenses incurred by a spouse employed elsewhere are to be paid first by the spouse's group plan, if any. *See* 34a-36a, 47a-48a (App.). The Plan totally excludes coverage for, *inter alia*, charges by a psychologist not recommended by and under the direction of a psychiatrist, charges covered by Workers' Compensation, charges incurred as a result of an act of violence or riot if the person seeking reimbursement is determined to be the aggressor, charges for well baby care (routine charges made by the hospital and doctor for the care of a normal, healthy newborn), charges for non-prescription drugs and medicines, charges for certain pre-existing conditions, charges for eyeglasses, charges for unnecessary cosmetic surgery, charges for routine physical examinations, and charges for preventative innoculations. *See* 31a, 42a-44a (App.).

pitalization component of the Shipyard's Plan historically provided reimbursement for up to 100% of the reasonable and customary charges for delivery and anesthesiologists, and up to $500 of all other hospital charges. By virtue of its Major Medical and Medical-Surgical components, the Plan also historically reimbursed the Shipyard's pregnant employees, like the pregnant spouses of its employees, and like all other employees and dependents, for 80% (after a $100 per calendar year deductible) of the reasonable and customary charges for all covered medical expenses, up to a lifetime maximum of $25,000 per person and for 100% of the reasonable and customary charges for certain surgical procedures.

After enactment of the PDA, the Shipyard amended the Hospitalization component of its Plan to provide that, "Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital confinement . . . ." [6] Because the Shipyard did not similarly amend the Hospitalization component with respect to the spouses of its male employees, the $500 limitation still applies to the pregnancy-related hospitalization costs incurred by the wives of male employees in the event of normal pregnancies.[7]

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[6] The PDA became effective on October 31, 1978. It required all fringe benefit programs in effect as of October 31, 1978 to come into compliance by April 29, 1979. For a period of one year from October 31, 1978, the PDA prohibited any employer which had a fringe benefit plan in effect on October 31, 1978 from reducing benefits or compensation in order to come into compliance with its terms. The full text of the PDA is reproduced at 50a-51a (App.).

[7] The booklet describing the principal features of the Plan describes the currently-effective maternity benefits hospitalization provision as follows:

> 28. What maternity benefits are provided?
>
> A. The Basic Plan pays up to $500 of the hospital charges and 100% of reasonable and customary charges for delivery and anesthesiologist charges.
>
> B. Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital

THE PROCEEDINGS BELOW

1. The District Court.

On September 20, 1979, John McNulty, a Shipyard employee covered by the Plan, filed a charge with the EEOC. J.A. 15. He claimed that the Plan unlawfully discriminated against him because of his sex in that it limited to $500 the hospitalization coverage available for his wife's pregnancy. *Id.* The United Steelworkers of America ("the Steelworkers") later filed a similar charge against the Shipyard on behalf of other individuals. J.A. 16.[8] The allegations of these charges found support in Questions and Answers 21 and 22, which state the EEOC's position that an employer's insurance program which "covers the medical expenses of spouses of female employees must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions." 29 C.F.R. Part 1604 (App.) (Question and Answers 21).[9]

In response to these charges, and to the EEOC's position with respect to them, the Shipyard filed a complaint seeking a declaratory judgment that Questions and Answers 21 and 22 were *ultra vires*, as well as arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. J.A. 5-14. The Shipyard also sought to permanently enjoin the EEOC from enforcing these Questions and Answers and to require the EEOC to publish a

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confinement as described in Question 16. This applies only to deliveries beginning on April 29, 1979 and thereafter.

C. Maternity benefits for the wife of a male employee will continue to be paid as described in part "A" of this question.

37a (App.).

[8] The Steelworkers, a labor organization, is the collective bargaining representative of the Shipyard's production and maintenance employees.

[9] The full text of Questions and Answers 21 and 22 is reproduced at Pet. 5-6.

notice in the Federal Register declaring them null and void. *Id.*[10]

The EEOC subsequently filed a Title VII complaint against the Shipyard in the same court. The EEOC's complaint alleged that the Shipyard "has intentionally engaged in unlawful employment practices in violation of Section 703(a) of Title VII" since 1965 because it has "imposed a limit of $500 on the hospital charges for dependent spouses of male employees for delivery or other pregnancy-related conditions, for which Defendant will pay" and, therefore, "has discriminated and is discriminating against its male employees with respect to compensation, terms, conditions and privileges of employment because of their sex." J.A. 28-30. This claim is based on the EEOC's view that:

> [A] health insurance plan provided by an employer for his workers and their families which limits the spousal coverage available to male employees, because of their sex, is unlawful under Title VII. Such a plan forces a male employee, unlike his female counterpart, to finance himself some of the expenses resulting from his spouse's disabilities. The man is therefore provided a smaller compensation package than his female co-worker. This practice on its face violates Section 703(a)(1) of the Act, 42 U.S.C. 2000e-2(a)(1), which forbids an employer to discriminate against any individual with respect to his "compensation, terms, conditions or privileges of employment, because of such individual's . . . sex."

R.Br. 6-7. The EEOC sought an order enjoining the Shipyard from engaging in any employment practices which

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[10] Jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-02 (declaratory judgment), and 5 U.S.C. §§ 701-06 (administrative procedure act). The Defendants in this action were the EEOC, the Steelworkers, and McNulty. The latter two Defendants were included pursuant to Rule 19(a)(2) of the Federal Rules of Civil Procedure. The district court found that it had jurisdiction of this matter pursuant to 28 U.S.C. §§ 2201-02. 510 F. Supp. at 71 (17a (App.)).

discriminate because of sex, an order requiring the Shipyard to provide equal compensation to its male employees in the future, monetary relief for those male employees allegedly discriminated against by operation of the Plan, and other affirmative relief designed to eradicate the effects of the alleged discrimination.[11] J.A. 30-31.

In granting the Shipyard's motion for summary judgment in the first case, the district court declared that Questions and Answers 21 and 22 are contrary to law and are of no force and effect. 510 F. Supp. at 71 (16a-17a (App.)). It also held that the Shipyard's Plan was not discriminatory on its face and that there was no showing that the Plan, by limiting reimbursements for the pregnancy-related expenses of spouses of male employees, had caused any gender-based effect in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). *Id.* It further held that McNulty was entitled to no benefits under Title VII which were not already provided to him under the Plan. *Id.*

The district court concluded that the PDA changed the law of Title VII only with respect to female employees and applicants for employment, and that the legislative history of the PDA indicates that the issue of maternity benefits for male employees' wives would have to be resolved using "the existing principles of Title VII." 510 F. Supp. at 70 (15a-16a (App.)). According to the district court, "the existing principles of Title VII" with respect to McNulty's claim, and all others involving neither female employees nor applicants for employment, are set forth in this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), *petition for rehearing denied*, 429 U.S. 1079 (1977). 510 F. Supp. at 71 (16a (App.)).

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[11] The EEOC invoked the district court's jurisdiction pursuant to 28 U.S.C. § 451 (courts and judges), 28 U.S.C. § 1343 (civil rights), and 28 U.S.C. § 1345 (United States as plaintiff), as well as 42 U.S.C. § 2000e-5(f)(1) and (3) (Title VII).

For the reasons stated in its decision in the declaratory judgment case, the district court subsequently granted the Shipyard's motion to dismiss the EEOC's complaint in the Title VII case for failure to state a claim upon which relief could be granted. 21a (App.).

2. The Court of Appeals.

A divided panel of the Fourth Circuit, having consolidated the cases, reversed the district court's decisions and remanded both cases to the district court. 22a & 23a (App.). The panel majority found that the PDA overturned *Gilbert* in its entirety and that the Shipyard's Plan is unlawful on its face. 667 F.2d at 450-51 (4a-7a (App.)). Judge Hall dissented from the majority opinion of the panel. In his opinion, "pregnancy-based classifications are lawful except to the extent that . . . *Gilbert* . . . has been limited by the Act." 667 F.2d at 452 (Hall, J., dissenting) (citations omitted). 8a (App.).

On rehearing *en banc*, the Fourth Circuit issued a *per curiam* decision affirming the panel's decision with three judges dissenting. 1a (App.).

SUMMARY OF ARGUMENT

The PDA was remedial legislation designed to alleviate the pregnancy-related barriers faced by women in the workforce and women desiring to enter the workforce. It did not change in any way an employer's Title VII obligations with respect to its male employees or their spouses. Indeed, in enacting the PDA, Congress expressly stated that the PDA would not require employers to provide maternity benefits for the spouses of their male employees to the same extent that they provide such benefits for their female employees. This Court's decision in *Gilbert* therefore governs the outcome of this "reverse" Title VII litigation. Moreover, even if *Gilbert* were no longer the law, the Shipyard's Plan, on its face, simply does not violate § 703(a)(1) of Title VII. The decisions of the district court were proper in all respects and should have been affirmed by the court below.

ARGUMENT

I. THE COURT BELOW MISINTERPRETED THE PDA.

The court below concluded that the PDA made it unlawful for an employer's medical insurance plan to make *any* distinctions based on pregnancy, childbirth, or related medical conditions. 667 F.2d at 450-51 (5a-7a (App.)). Although conceding that the district court's construction of the PDA found support in "some legislative history," the court below nevertheless found the Shipyard's Plan unlawful because:

> The language of the new statute strongly indicates a purpose to equate pregnancy, childbirth and related medical conditions with sex. Distinctions based on pregnancy, the Congress said, are distinctions based on sex.
>
> Since the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute.

667 F.2d at 451 (7a (App.)). The court below stands alone in its construction of the PDA.[12]

Its view comports with neither the PDA's language nor its legislative history. Properly construed, the PDA

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[12] *See* EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir.), *petition for rehearing denied*, No. 81-4542 (Sept. 27, 1982), *petition for writ of certiorari filed*, No. 82-1006 (Dec. 15, 1982); EEOC v. A.R.A. Mfg. Co., No. CA3-81-0406-F (N.D. Tex. Aug. 18, 1982); EEOC v. Joslyn Mfg. & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982); EEOC v. Emerson Elec. Co., 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982). *See also* Barone v. Hackett, 28 Fair Empl. Prac. Cases (BNA) 1765, 1769-70 (D.R.I. 1982). The only case to support the decision of the court below—United Teachers-Los Angeles v. Board of Ed., 29 Empl. Prac. Dec. (CCH) ¶ 32,759 (C.D. Cal.), *apeal docketed*, No. 82-5360 (9th Cir. March 12, 1982)—has been effectively nullified by the Ninth Circuit's decision in *Lockheed*.

changed the law of Title VII only with respect to female employees and female applicants for employment. It thus had only a limited impact on this Court's decision in *Gilbert*.

A. By Its Terms, The PDA Is Applicable Only To Female Employees And Female Applicants For Employment.

The PDA added a new subsection to the "Definitions" section of Title VII (Section 701). The pertinent part of this new subsection, Section 701(k), appears in two clauses separated by a semicolon:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e-(k).

In construing this language to extend beyond female employees and applicants for employment, the court below correctly noted that, "There is nothing in the first clause to suggest that the definition will vary depending upon the employment status of the pregnant woman." 667 F.2d at 450 (5a (App.)). What the court somehow failed to recognize, however, is that this clause, standing alone, has no meaning. To have any meaning at all, the PDA's first clause must be read together with some other part of Title VII where the words "because of sex" or "on the basis of sex" appear. *See Lockheed*, 680 F.2d at 1245.

When read together with § 703(a)(1), which the Shipyard allegedly violated in this case, the PDA's first clause makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employ-

ment, *because of such individual's . . . [pregnancy, childbirth, or related medical conditions]*. So read, the PDA's first clause is clearly limited in scope to employees and applicants for employment. Neither before nor after enactment of the PDA did an employee's spouse, as such, receive "compensation" or have "terms, conditions, or privileges of employment." [13] Nor can it be posited that the PDA's first clause changed in any way an employer's § 103(a)(1) obligations with respect to its male employees. Male employees simply cannot become pregnant.[14]

The court below also misconstrued the PDA's second clause, which contains the only requirement of the PDA itself. The Shipyard contends that the PDA's second clause requires employers to treat female applicants for employment "affected by pregnancy" the same as other applicants for employment "similar in their ability or inability to work" and to treat female employees "affected by pregnancy" the same as other employees "similar in their ability or inability to work."

The interpretation given to this clause by the court below is less than pellucid. It appears, however, that the court determined that a male employee's spouse can be a "woman affected by pregnancy" and that a spouse is also a "person" within the meaning of that clause. 667 F.2d

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[13] The EEOC does not claim that the Shipyard's Plan violates § 703(a)(2). It is nevertheless worth noting that, when read together with the PDA's first clause, § 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his *employees or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's . . . [pregnancy, childbirth, or related medical conditions]*." This provision is also clearly inapplicable to non-employees.

[14] While the court below apparently found the Shipyard's Plan unlawful because it "contains a distinction based on pregnancy," the EEOC's complaint alleges that the Plan is unlawful because it provides less compensation for male employees than for female employees.

at 450-51 (5a-6a (App.)).[15] If this were correct, the PDA would require a spouse affected by pregnancy to be treated the same as another spouse "not so affected but similar in [her] ability or inability to work." This reading imposes on an employer an impossible task. As Judge Hall pointed out in his dissent in the decision at issue herein:

> To determine whether a pregnant woman is being treated the same as some other person who has the similar ability or inability to work, the pregnant woman, by logical necessity, must also be an employee. To hold otherwise is to simply ignore the language of the Act.

667 F.2d at 452 (Hall, J., dissenting) (8a (App.)). *See also Lockheed*, 680 F.2d at 1245 ("[t]he second clause in its reference to women employees ('employment-related purposes'; 'other persons not so affected but similar in their ability or inability to work') clarifies the Congressional intent by restating the substance of the first clause in other than definitional terms, and making it clear that its limitation to employees was not inadvertent"); *Barone v. Hackett*, 28 Fair Empl. Prac. Cases at 1769 ("this language suggests that Congress intended to afford pregnant women the right to equal treatment in the employment setting"); *EEOC v. Emerson Electric Co.*, 28 Fair Empl. Prac. Cases at 1555 ("the phrase 'shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work,' seems to confine the comparison required by the statute to employees"); *EEOC v. Joslyn Manufacturing Co.*, 27 Fair. Empl. Prac. Cases at 876 ("[t]he language 'employment-related purposes' and

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[15] Even the EEOC does not go this far. If the court below is correct that pregnant spouses are "women affected by pregnancy," then pregnant non-spouse dependents must also be so characterized. The EEOC, however, expressly sanctions "distinctions based on pregnancy" in employers' health insurance plans. *See* 29 C.F.R. § 1604 (App.) (Question and Answer 21) (an employer is not required to provide health insurance for pregnancy-related medical costs incurred by non-spouse dependents).

'similar in their ability or inability to work' has a commonsense reading that it pertains to women workers only").

If the language of the PDA is at all ambiguous, a review of its legislative history makes its meaning unmistakeable. Congress' sole aim was to enact remedial legislation for female employees and applicants for employment.

B. The PDA Was Remedial Legislation Designed To Ease The Pregnancy-Related Burdens Faced By Women In The Labor Market Or Desiring To Enter The Labor Market.

The PDA was Congress' reaction to *Gilbert*, which involved a Title VII challenge to a disability insurance program maintained by General Electric Company ("GE"). The plaintiffs in that case, female employees of GE, alleged that GE's program, which provided income maintenance for temporary absences from work due to disabilities, violated Title VII's ban on sex discrimination because it did not provide income maintenance for female employees absent from work because of pregnancy. The *Gilbert* Court held GE's plan to be gender-neutral because "an exclusion of pregnancy from a disability-benefits plan is not gender-based discrimination at all." 429 U.S. at 136. It also held that Title VII did not require "greater economic benefits" to be paid "to one sex or the other because of their differing roles in 'the scheme of human existence.'" 429 U.S. at 139 n.17.[16]

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[16] Because the evidence in *Gilbert* showed that the per capita cost of GE's disability benefits program was slightly higher for female employees than for male employees, GE argued to the district court that including pregnancy coverage would result in discrimination against male employees. Gilbert v. General Elec. Co., 375 F. Supp. 367, 383 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976), *petition for rehearing denied*, 429 U.S. 1079 (1977). In rejecting this argument, the district court noted that such an argument must fail for lack of proof and, in any event, that:

> Provision of a marginally greater economic benefit to women, if such it is, in the form of pregnancy disability benefits within an otherwise all inclusive disability program, cannot reasonably

To Justice Brennan the result in *Gilbert* conflicted with "the ultimate objective of Title VII, 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [*sexually*] *stratified job environments* to the disadvantage of [women].'" 429 U.S. at 160 (Brennan, J., dissenting) (quoting from *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 800 (1973) (brackets in original) (emphasis added)). Justice Brennan also found the result in *Gilbert* contrary to "the uniform testimony of governmental investigations which show that pregnancy exclusions built into disability programs both financially burden *women workers* and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force." 429 U.S. at 158 (Brennan, J., dissenting) (emphasis added).

The PDA was remedial legislation designed to address Justice Brennan's concern. In his foreword to the official printing of the PDA's legislative history,[17] Senator Williams, the PDA's chief sponsor, described the purpose of the Act:

> The Act provides an essential protection for *working women*. The number of *women in the labor force* has increased dramatically in recent years. Most of *these women are working* or seeking work because of the economic need to support themselves or their families. It is expected that this trend of increasing participation by *women in the workforce* will continue in the future and that an increasing propor-

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be considered more favored treatment. If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence. . . . If Title VII intends to sexually equalize employment opportunity there must be this one exception to the cost differential defense.

Id.

[17] Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* [hereinafter, "Leg. Hist."].

> tion of *working women* will be those who are mothers. It is essential that *these* women and their children be fully protected against the harmful effects of unjust employment discrimination on the basis of pregnancy.

Leg. Hist. at iii (emphasis added).[18] When introducing the Conference Report on S.995, the bill that became the PDA, Senator Williams further explained:

> Because of the Supreme Court's decision in the Gilbert case, this legislation is necessary to provide fundamental protection against sex discrimination for our Nation's 42 million *working women*. This protection will go a long way toward insuring that American women are permitted to assume their rightful place in our Nation's economy.
>
> In addition to providing protection to working women with regard to fringe benefit programs, such as health and disability insurance programs, this legislation will prohibit other employment policies which adversely affect *pregnant workers*.

124 Cong. Rec. S18,977 (daily ed. Oct. 13, 1978), Leg. Hist. at 200-201 (emphasis added). These statements

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[18] Senator Williams introduced S.995, the Senate bill which ultimately became the PDA. He also chaired both the Senate Committee on Human Resources and the Senate Subcommittee on Labor to which S.995 was referred. In addition, he was the most active participant in the debate on the Senate floor. His statements are therefore entitled to great weight, since "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1950). *See also* Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58 (1964).

Although Senator Williams' foreword is, of course, a postenactment commentary, it is the view of the legislation's chief sponsor, prepared soon after its passage. As this Court said in a similar setting, "[a]lthough we cannot accord these remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the [Act's] scope and purpose . . . ." Cannon v. University of Chicago, 441 U.S. 677, 687 n.7 (1979).

correspond fully to the comments made by Senator Williams on the floor of the Senate. When introducing S.995, for example, Senator Williams explained that enactment of his bill was necessary because "[*w*]*orking women* throughout our Nation from varied walks of life are in need of relief." 123 Cong. Rec. S4142-43 (daily ed. March 15, 1977), Leg. Hist. at 4.

The remarks of Senator Williams were echoed by those of Congressman Augustus F. Hawkins, the chief sponsor of H.R. 5055 and its successor bill H.R. 6075, the House versions of the bill that eventually became the PDA.[19] When introducing these bills, Congressman Hawkins stated that the proposed legislation would promote progressive laws that had "lifted many of the barriers previously faced by *women entering the labor market*," [20] and was "necessary [because] . . . discrimination against pregnant women is one of the chief ways in which *women's careers* have been impeded and *women employees* treated like second-class employees." [21] In further remarks, Congressman Hawkins explained:

> H.R. 6075 was introduced during the first session of the 95th Congress to clarify congressional intent that sex discrimination includes discrimination based on pregnancy and specifically to define the standards which require that *pregnant workers be treated the same as other employees on the basis of their ability or inability to work.*

124 Cong. Rec. H6863 (daily ed. July 18, 1978), Leg. Hist. at 166 (emphasis added).

Literally dozens of similar remarks made by proponents of the Act on the floor of both the House and

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[19] H.R. 5055 was identical to S.995. H.R. 5055 was also identical to H.R. 6075 except that the latter added language relating to abortions.

[20] 123 Cong. Rec. E1487 (daily ed. March 15, 1977), Leg. Hist. at 12 (emphasis added).

[21] 123 Cong. Rec. E2095 (daily ed. April 5, 1977), Leg. Hist. at 25 (emphasis added).

the Senate uniformly reinforce the conclusion of the district court in this case: "[t]he clear legislative intent behind the PDA was to 'insure that *working women* are protected against all forms of *employment discrimination* based on sex.'" 510 F. Supp. at 69 (12a (App.)) (emphasis in original) (quoting S. Rep. No. 331, 95th Cong., 1st Sess. 3, Leg. Hist. at 40).[22] In fact, one

[22] These remarks include those of Senator Williams, 123 Cong. Rec. S14,989 (daily ed. Sept. 15, 1977), Leg. Hist. at 62-63 ("central purpose of the bill is to require that *women workers* be treated equally with *other employees* on the basis of their ability or inability to work"); Senator Javits, 124 Cong. Rec. S18,978 (daily ed. Oct. 13, 1978), Leg. Hist. at 203 ("bill represents only basic fairness for *women employees*"); Senator Brooke, 123 Cong. Rec. S4144 (daily ed. March 15, 1977), Leg. Hist. at 7 (effect of *Gilbert* "could be devastating" on "*working women* and their families"); Senator Stafford, 124 Cong. Rec. S18,979 (daily ed. Oct. 13, 1978), Leg. Hist. at 204 (bill would remove "major source of discrimination unjustly afflicting *working women* in America); Senator Bayh, 123 Cong. Rec. S4403 (daily ed. March 18, 1977), Leg. Hist. at 21 (bill needed to "help provide true equality for the *working women* of this Nation"); Senator Kennedy, 123 Cong. Rec. S14,992 (daily ed. Sept. 15, 1977), Leg. Hist. at 71 (time has come to guarantee "*working women*" that "sex discrimination in employment is ended"); Senator Biden, 123 Cong. Rec. S15,056 (daily ed. Sept. 16, 1977), Leg. Hist. at 126 (bill needed to discourage abortion since 25 or 39 million *working women* "are there because of the dire economic need to support their families"); Senator Cranston, 123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977), Leg. Hist. at 132 (bill would be a "significant step forward for *working women* and their families" and would advance Title VII goal of "eliminat[ing] those discriminatory practices which pose barriers to *working women . . . in the workplace*"); Senator Culver, 123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977), Leg. Hist. at 132 (bill is "to better ensure equal treatment for *women in the workplace*"); Senator Mathias, 123 Cong. Rec. S4145, S15,058 (daily ed. March 15, Sept. 16, 1977), Leg. Hist. at 8, 134 (*Gilbert* set back "women's efforts for equity in the *job market*"; bill recognizes that "disparate treatment of *pregnant workers* is in reality discrimination on the basis of sex"); Representative Hawkins, 124 Cong. Rec. H6863, H13,495 (daily ed. July 8, Oct. 14, 1978), Leg. Hist. at 168, 207 (genuine equality an illusion if employers are "free to make pregnancy the basis of unfavorable treatment of *working women*"; bill is to "help eliminate the unfavorable treatment of *pregnant working women*"); Repre-

prominent sponsor, Senator Jacob Javits,[23] explained that:

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sentative Sarasin, 124 Cong. Rec. H13,495-96 (daily ed. Oct. 14, 1978), Leg. Hist. at 208, 209 (bill would "end discrimination against . . . *working women*," and ensure that "rights of *pregnant workers* will be protected"); Representative Green, 124 Cong. Rec. H6865 (daily ed. July 18, 1978), Leg. Hist. at 172 (bill establishes "rights *working women* should have had years ago"); Representative Quie, 124 Cong. Rec. H6867 (daily ed. July 18, 1978), Leg. Hist. at 177 (bill "necessary in order for *women employees* to enjoy equal treatment in fringe benefit programs"); Representative Akaka, 124 Cong. Rec. H6867 (daily ed. July 18, 1978), Leg. Hist. at 178 ("bill simply requires that *pregnant workers* be fairly and equally treated"); Representative Chisholm, 124 Cong. Rec. H6868 (daily ed. July 18, 1978), Leg. Hist. at 180 ("issue is whether or not we . . . will assure equality at the workplace for *pregnant workers*"); Representative Collins, 124 Cong. Rec. H6869 (daily ed. July 18, 1978), Leg. Hist. at 182 (bill "would end widespread abuse of *pregnant women* in the workplace"); Representative LaFalce, 124 Cong. Rec. H6869 (daily ed. July 18, 1978), Leg. Hist. at 181 (*Gilbert* disserved "*working women* of childbearing age"; bill would have "all *workers* . . . be treated the same in regard to health insurance coverage, where the issue is not the gender or condition of the employee but *ability to work*"); Representative Corrada, 124 Cong. Rec. H6867 (daily ed. July 18, 1978), Leg. Hist. at 178 (bill would remedy *Gilbert* and provide for welfare and job security of working women); Representative Whalen, 124 Cong. Rec. H6869 (daily ed. July 18, 1978), Leg. Hist. at 184 (bill would restore Title VII intent "to protect *all workers, pregnant or otherwise*, from sex discrimination"); Representative Tsongas, 124 Cong. Rec. H6870 (daily ed. July 18, 1978), Leg. Hist. at 185 (bill would "go a long way toward assuring women *equality in the job market*"); and Representative Burke, 124 Cong. Rec. H6870 (daily ed. July 18, 1978), Leg. Hist. at 185 ("bill is of great economic importance to all *working women*"). (All emphases added).

[23] Senator Javits was the ranking minority member of the Senate's Human Resources Committee, a member of the Senate's delegation to the Committee of Conference and one of the most active participants in the floor debates. *See* 123 Cong. Rec. S14,991 (daily ed. Sept. 15, 1977), Leg. Hist. at 66; 123 Cong. Rec. S15,049 (daily ed. Sept. 16, 1977), Leg. Hist. at 106; H.R. Rep. No. 1786, 95th Cong., 2d Sess. 1-5 (1978) (Conference Report), Leg. Hist. at 194-98; 124 Cong. Rec. S18,978 (daily ed. Oct. 13, 1978), Leg. Hist. at 202.

> This legislation does *not* represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of Title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to *pregnant women employees* to the point where it was last year, before the Supreme Court's decision in *Gilbert v. General Electric Corp.*, 426 U.S. 125 (1976).
>
> This approach represents only basic fairness *for employees who become pregnant.*

123 Cong. Rec. S14,991 (daily ed. Sept. 15, 1977), Leg. Hist. at 66-67 (emphasis supplied).

C. The PDA Did Not Change The Law With Respect To Male Employees Or Their Wives.

In construing the PDA to be applicable to male employees' spouses, the court below seemingly ignored the foregoing evidence of Congress' limited intent. It also overlooked the fact that the most authoritative sources of legislative history—the three Committee Reports on the bills which became the PDA [24]—*all* expressly state that the second clause of the PDA would mandate an employer's fringe benefits program to treat women affected by pregnancy equally to "*other employees.*" [25] This uni-

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[24] Report of the Senate Committee on Human Resources, S. Rep. No. 331, 95th Cong., 1st Sess. (1977), Leg. Hist. at 38-54; Report of the House Committee on Education and Labor, H.R. Rep. No. 948, 95th Cong., 2d Sess. (1978), Leg. Hist. at 147-64; Report of the Committee of Conference, H.R. Rep. No. 1786, 95th Cong., 2d Sess. (1978), Leg. Hist. at 194-98. "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168, 186 (1969). *See also* Chandler v. Roudebush, 425 U.S. 840, 858 n.36 (1976); United States v. UAW, 352 U.S. 567, 585-86 (1957).

[25] S. Rep. No. 331, 95th Cong., 1st Sess. 14 (1977), Leg. Hist. at 51 (Section-by-Section Analysis); H.R. Rep. No. 948, 95th Cong., 2d Sess. 13 (1978), Leg. Hist. at 159 (Section-by-Section Analysis); H.R. Rep. No. 1786, 95th Cong., 2d Sess. 3 (1978), Leg. Hist. at 196.

form statement of congressional intent should alone suffice to resolve any ambiguity concerning the plain language of the second clause of the PDA—the clause principally relied upon by the court below.

Other passages in the House and Senate Reports confirm this meaning. The House Report explains that the proposed legislation would:

> not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. . . . The bill would simply require that pregnant women be treated the same as *other employees* on the basis of their ability or inability to work.[26]

The Senate Report is explicit in stating that the PDA was not meant to change the law with respect to male employees' wives:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that *the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination.* Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. *Therefore, the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.* . . .
>
> It was suggested before this committee that an effect of title VII, once this bill was enacted, would be to require that if the maternity costs of women employees were paid under a medical plan, the similar

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(joint explanatory statement of the Committee of Conference) (emphasis added).

[26] H.R. Rep. No. 948, 95th Cong., 2d Sess. 4 (1978), Leg. Hist. at 150 (emphasis added). *See also* S. Rep. No. 331, 95th Cong., 1st Sess. at 4 (1977), Leg. Hist. at 41 (virtually identical language).

costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect. *This bill would not mandate that women dependents be compared with women employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.*

On the other hand, the question of whether an employer who does cover dependents, either with or without additional cost to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. *If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents.*

S. Rep. No. 331, 95th Cong., 1st Sess. 5-6 (1977), Leg. Hist. at 42-43 (emphasis added).[27]

That the PDA does not reach pregnancy coverage for employees' spouses is also evident in the Reports' estimates of the legislation's anticipated costs to employers. The potential cost of the PDA was the major factor mitigating against its passage. The Committee Reports discounted the potential costs by noting that in several states pregnancy discrimination was already unlawful. Thus, the Senate Report concluded that "the cost of this legislation would not include the provision of *hospital medical benefits* for maternity in States, like New York, where insurance for maternity is mandatory under State

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[27] The court below chose to quote only the last two paragraphs of this passage, thus ignoring the reference to "existing title VII principles."

law." S. Rep. No. 331, 95th Cong., 1st Sess. 10 (1977), Leg. Hist. at 47 (emphasis added).[28]

Mandatory maternity coverage in New York, as Congress realized, was a product both of judicial interpretation of the state's Human Relations Law, *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884, 14 Fair Empl. Prac. Cases (BNA) 42 (1976), and legislative revision of the state's Workers' Compensation Law.[29] Neither development required employers providing spousal medical benefits to insure against spousal pregnancies. Specifically, *Brooklyn Union Gas*, and each of the New York cases discussed therein, involved only pregnant employees. Similarly, when New York's Disability Benefits Law was amended in 1977, the coverage of the statutory provision by its terms was limited to benefits for pregnant *employees*.[30] The Committee Reports' observation that the PDA would have no fiscal impact on employers doing business in New York is therefore further evidence, conclusive in itself, that Congress did not intend the PDA to impose new obligations with respect to medical benefits for male employees' spouses.[31]

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[28] *See also* H.R. Rep. No. 948, 95th Cong., 2d Sess. 10 (1978), Leg. Hist. at 156.

[29] S. Rep. No. 331, 95th Cong., 1st Sess. 10 (1977), Leg. Hist. at 47; H.R. Rep. No. 948, 95th Cong., 2d Sess. 11 (1978), Leg. Hist. at 157. *See also* Delta Air Lines, Inc. v. Kramarsky, 485 F. Supp. 300, 302 (S.D.N.Y. 1980), *rev'd in part, vacated in part*, 650 F.2d 1287 (2d Cir.), *vacated in part*, 666 F.2d 21 (1981), *prob. jur. noted*, 102 S. Ct. 1968 (1982).

[30] *See* N.Y. Work Comp. Law § 201(9)(A)(B) (McKinney Supp. 1982) ("Disability" means "inability of an *employee*" to work because of nonoccupational injury or sickness; "Disability also includes disability caused by or in connection with a pregnancy.") (Emphasis added.)

[31] In Pennsylvania and Wisconsin, the two other states the House Report cited as having judicially interpreted their fair employment statutes to cover pregnancy discrimination (H.R. Rep. 948, 95th Cong., 2d Sess. 11 (1978), Leg. Hist. at 157), the rulings were also

The cost of covering pregnant employees, not the cost of covering pregnant wives of male employees, was the focus of all debate and discussion on the economic effects of the Act.[32] Even opponents of the Act, who argued that its costs were too high, did not include the enormous costs of dependents' coverage in their estimates.[33] That Congress failed to discuss the staggering additional costs of covering spouses' pregnancies in a debate which focused on the cost of the PDA further underscores the limited congressional intent.

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developed in the context of female employees. *E.g.*, Anderson v. Upper Bucks County Area Vocational Technical School, 30 Pa. Commw. 103, 373 A.2d 126, 20 Fair Empl. Prac. Cases (BNA) 1411, 1412, 1414 (Pa. Commw. Ct. 1977) and cases there cited (pregnant teachers challenged sick leave policy); Ray-O-Vac v. Department of Industry, Labor and Human Relations, 70 Wis. 2d 919, 236 N.W.2d 209, 12 Fair Empl. Prac. Cases (BNA) 64 (1975) (exclusion of pregnancy for purposes of employee disability benefits).

[32] *See Legislation to prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. (1977) [hereinafter, "House Hearings"] at 22-23 (statement of Wendy Williams, Professor of Law, Georgetown Law School), 68 (statement of Laurence Gold, Special Counsel, AFL-CIO), 263 (statement of Mae Walterhouse, President, Federally Employed Women, Inc.), 296-97 (statement of Odessa Komer, Vice President, UAW); *Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977) [hereinafter, "Senate Hearings"] at 35 (statement of Alexis Herman, Director, Women's Bureau, Employment Standards Administration, Department of Labor), 214-15 (statement of Laurence Gold, Special Counsel, AFL-CIO); 123 Cong. Rec. S4145 (daily ed. March 15, 1977), Leg. Hist. at 7 (remarks of Sen. Brooke); 123 Cong. Rec. S4403-04 (daily ed. March. 18, 1977), Leg. Hist. at 22 (Fact Sheet on S.995); 123 Cong. Rec. S2096 (daily ed. April 5, 1977), Leg. Hist. at 27 (remarks of Rep. Hawkins).

[33] House Hearings at 89 (statement of G. Brockwel Heylin, Labor Relations Attorney, Chamber of Commerce of the United States); Senate Hearings at 177 (statement of Fred T. Thompson, Chairman, Labor Relations Committee, Electronic Industry Association Industrial Relations Council); 123 Cong. Rec. S15,054 (daily ed. Sept. 16, 1977), Leg. Hist. at 121 (remarks of Sen. Helms).

It is also significant that all witnesses to address the question of medical benefits in the House and Senate Hearings did so *only* in the context of benefits for female employees. Their exclusive concern was that this was yet another area where female employees were being discriminated against on the basis of pregnancy.[34] Conversely, no one expressed the view that Title VII should prohibit discrimination against "pregnancy" in general or that male employees were being discriminated against because their pregnant wives did not receive full coverage.[35]

The lack of any intention to extend the PDA to spousal pregnancy benefits is also apparent from the affirmative

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[34] *See, e.g.*, House Hearings at 45 (statement of Wendy Williams, Professor of Law, Georgetown Law School), 135 (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice), 288-89 (statement of Bella S. Abzug, Presiding Officer, National Commission on the Observance of International Women's Year, 1975); Senate Hearings at 56 (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice), 135 (statement of Wendy Williams, Professor of Law, Georgetown Law School), 150 (statement of Susan Deller Ross, Co-Chair of the Campaign to End Discrimination Against Pregnant Workers), 184 (statement of New York State Sen. Carol Bellamy), 293 (statement of Toni Sterling, Member, Local 65, United Steelworkers of America), 301 (statement of Roberta Woods, Chairperson, United Steelworkers of America, District 31, Women's Caucus). *See also* 123 Cong. Rec. S14,990 (daily ed. Sept. 15, 1977), Leg. Hist. at 65 (remarks of Sen. Williams).

[35] In contrast to the relative silence of Congress on this subject during hearings and debates on the PDA bills, the question of dependents' benefits provoked great controversy when the EEOC's Questions and Answers were published for public comment. The EEOC's Introduction to its Final Interpretive Guidelines On Sex Discrimination acknowledges that "[a] majority of [all] the comments [concerning the EEOC's Interim Guidelines and the attached Questions and Answers] questioned the appropriateness of the Commission's answer to Question 21." 44 Fed. Reg. 23,805 (1979). This reaction suggests, first, that similar controversy would have occurred in Congress had the EEOC's position been considered therein and, second, that the EEOC's view is in fact a novel one not previously endorsed by Congress.

comments concerning the specific question of dependents' benefits. One particularly revealing dialogue occurred between Senator Williams and Senator Orrin Hatch, a minority member of the Senate Human Resources Committee:

> Mr. HATCH: . . . *The phrase "women affected by pregnancy, childbirth or related medical conditions," . . . appears to be overly broad,* and is not limited in terms of employment. It does not even require that the person so affected be pregnant.
>
> *Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. . . .*
>
> *Could the sponsors clarify exactly whom that phrase intends to cover?*
>
> . . . .
>
> MR. WILLIAMS: If there is any ambiguity, with regard to income maintenance plans, I cannot see it. ". . . shall be treated the same for all employment-related purposes." I do not see how one can read into this any pregnancy other than that pregnancy that relates *to the employee, and if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee,* an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee.
>
> Mr. HATCH: OK; or the effects on other people as a result of the pregnancy of a female employee.
>
> Mr. WILLIAMS: Exactly, it does not.
>
> Mr. HATCH: So the Senator is satisfied that, though the committee language I brought up, "woman affected by pregnancy" seems to be ambiguous, what it means is that *this act only applies to the particular*

woman who is actually pregnant, who is an employee and has become pregnant after her employment?

Mr. WILLIAMS: *Exactly.*

123 Cong. Rec. S15,038-39 (daily ed. Sept. 16, 1977), Leg. Hist. at 80 (emphasis added).

The intention to protect only female employees and applicants in fact was clear from the very beginning of the legislative process. In a colloquy with Allen Lazarescu of the American Council of Life Insurance and the Health Insurance Association of America, Senator Williams emphasized that medical expense benefits, like disability benefits, would go *only* to pregnant female employees:

Mr. LAZARESCU: . . . [T]he figures we have are $0.6 billion for disability and $1 billion for medical expense.

So I will pick that up later.

Now, the cost of the benefits to be provided as a result of S.995——.

Senator WILLIAMS: By the way, and just to spell it out, what number do you use for women in the work force that would be covered?

Mr. LAZARESCU: Well, I am not quite sure I understand the question.

Senator WILLIAMS: This deals with pregnancy. *It only deals with women employees.*

Now, how many are you talking about?

Senate Hearings at 402 (emphasis supplied).

D. The Remarks Of Senators Bayh And Cranston Are Entitled To No Deference.

The court below, basically ignoring the foregoing legislative history, relied instead on two isolated remarks made on the floor of the Senate by Senators Bayh and Cranston. What the court failed to understand, as an analysis of the senators' remarks makes clear, is that each senator was advancing his own idiosyncratic (and erroneous) view of Title VII law prior to passage of the PDA, rather than describing the scope of the PDA itself.

The remarks relied upon by the court below are as follows:

> [*T*]*he legislation will not require that companies provide the same pregnancy coverage for the dependents of male employees that it provides to its female employees.* There remains the question, however, of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage. *While it is difficult to second-guess the courts,* I feel that the history of sex discrimination cases under the *14th amendment* in addition to *previous interpretations of the Title VII regulations relating to the treatment of dependents* will require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees.

123 Cong. Rec. S15,037 (daily ed. Sept. 16, 1977), Leg. Hist. at 75 (remarks of Sen. Bayh) (emphasis added).

> When the [Senate Committee on Labor and] Human Resources . . . considered how S. 995 would affect medical coverage for dependents of employees, the question was raised about the obligation of an employer to pay for the pregnancy-related medical expenses of spouses of employees. The committee presumed that most comprehensive medical plans do cover dependents, and that it was unlikely that any comprehensive plan covering spouses would cover husbands of women employees but not wives of male employees. Thus, the committee did not directly answer the question of whether such plans would be discriminatory under title VII.
>
> Mr. President, I would like to express for the record *my own view* that such a plan would indeed be discriminatory, and *would be prohibited by the title VII sex discrimination ban.* A plan having such anti-

> family ramifications would be totally inimical to the values we hold so dear and which we, in these times, are attempting to strengthen.

123 Cong. Rec. S15,058 (daily ed. Sept. 16, 1977), Leg. Hist. at 131 (remarks of Sen. Cranston) (emphasis added).

The remarks of Senator Bayh, based on his feelings about the scope of the fourteenth amendment and previous interpretations of Title VII regulations, are not part of the legislative history of the PDA at all. Rather, they express his personal views about the reach of Title VII without the PDA. Thus, they are perfectly consistent with the view, expressed in the Senate Report, that the PDA does not affect the question of dependents' benefits. Senator Cranston, similarly, was stating his "own view" on Title VII prior to enactment of the PDA.

Properly viewed, these remarks are isolated post-hoc interpretations of the scope of Title VII prior to its amendment by the PDA. As such, they are entitled to no deference. *See Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979); *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 714 (1978).

Moreover, even if viewed as opinions on the reach of the PDA itself, the senators' isolated remarks can have but little weight. Although each senator was among thirty "co-sponsors" of S.995, neither was a member of the Senate's delegation to the House-Senate Conference and neither was even a member of the subcommittee before which the hearings on S.995 were held. By contrast, the bill's principal sponsor, Senator Williams, made it clear that only pregnant workers would be protected by the bill. These isolated remarks, then, coming from rela-

tively insignificant proponents of the bill, and contradicted by the more authoritative views expressed by the bill's principal sponsors and all other legislative history, including the Senate Report, cannot be deemed as reliable indicia of congressional intent.[36]

E. The PDA Overturned *Gilbert* Only With Respect To Pregnancy-Related Title VII Claims Made By Female Employees And Female Applicants For Employment.

Gilbert's holdings were two. First, that "an exclusion of pregnancy from a disability-benefits plan is not gender-based discrimination at all." 429 U.S. at 136. *See also Manhart*, 435 U.S. at 715. Second, that "[t]he District Court was wrong in assuming . . . that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.'" 429 U.S. at 139 n.17. *See also Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977).

The first of these holdings was affected by the PDA's first clause. As amended by that clause, § 703(a)(1) makes it unlawful for an employer "to discriminate against any individual with respect to his compensation . . . because of such individual's . . . [pregnancy]." Accordingly, an exclusion of pregnancy from a disability-benefits plan is now unlawful if it results in a difference in compensation for the pregnant individual.

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[36] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) (even the remarks of the legislation's sponsor cannot control if they conflict with the Committee reports and statements of other congressmen); Zuber v. Allen, 396 U.S. at 186 ("Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report"); EEOC v. Lockheed Missiles & Space Co., 680 F.2d at 1245-46; EEOC v. Joslyn Mfg. Co., 524 F. Supp. at 1143-44.

The above-described second holding, unaffected by the PDA's first clause, was overturned by the PDA's second clause, which requires employers to treat "women affected by pregnancy, childbirth, or related medical conditions . . . the same for all employment-related purposes, *including the receipt of benefits under fringe benefit programs*, as other persons not so affected but similar in their ability or inability to work . . . ." Because of the second clause, regardless of cost, an employer may not exclude employee pregnancies from the scope of an otherwise comprehensive fringe benefit plan for its employees.

In enacting the PDA, Congress intended to alleviate the pregnancy-related burdens faced by women in the labor force and women desiring to enter the labor force. It was Congress' view that if pregnancy, a condition unique to women, increases the cost of an employer's medical insurance plan, the employer must bear that cost for its employees precisely because of the female's "differing role in the scheme of human existence." *Gilbert*, 429 U.S. at 139 n.17.

The EEOC argues that if the PDA extends benefits only to female employees and applicants for employment, "Congress, in a simple definitional amendment to Title VII, has mandated special, preferential treatment contrary to the basic principles of the underlying law." R.Br. at 9. This is precisely what Congress did. Only women can become pregnant. Thus, only women face pregnancy-related employment disadvantages. Had Congress wished to require employers' medical insurance plans to cover the pregnancies of male employees' spouses, it would have required fringe benefit plans covering the pregnancies of female employees to also cover the pregnancies of the wives of male employees. This the Congress expressly chose not to do.[37] Instead, Congress

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[37] "It was suggested before this committee that an effect of title VII, once this bill was enacted, would be to require that if the

enacted legislation exclusively for the benefit of the female worker.[38]

The language chosen by Congress simply does not support a finding that the PDA prohibits discrimination against pregnancy itself. If the language of the PDA were insufficient to indicate Congress' limited intent, moreover, the history of the PDA, dismissed without discussion by the court below as "some legislative history," conclusively establishes that the PDA's sole aim is to enhance employment conditions for female employees and applicants for employment.[39] Congress simply was not concerned about male employees or their wives.

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maternity costs of women employees were paid under a medical plan, the similar costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect." S. Rep. 331, 95th Cong., 1st Sess. 6 (1977), Leg. Hist. at 43.

[38] This Court has routinely upheld legislation enacted for the benefit of a historically disadvantaged group. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers v. Weber, 443 U.S. 193, 201-02 (1979); Califano v. Webster, 430 U.S. 313, 318 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). *See also* Miss. Univ. for Women v. Hogan, 102 S.Ct. 3331, 3340 (1982).

[39] *See, e.g.*, General Building Contractors Ass'n, Inc. v. Pennsylvania, 102 S. Ct. 3141, 3148, 3149 (1982) (reach of 42 U.S.C. § 1981 to be determined in light of the " 'events and passions of the time' in which the law was forged"; scope of section is limited to intentional practices, which were the "immediate evils with which the [enacting] Congress was concerned"); United Steelworkers of America v. Weber, 443 U.S. 193, 201-08 (1979) (voluntary affirmative action program for blacks lawful despite Title VII's racial discrimination ban in light of legislative history focusing on the plight of black workers and indicating desire to avoid undue federal regulation of private business). *See also Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting) ("discrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of 'disadvantaged' individuals' ").

II. THE DISTRICT COURT CORRECTLY DECIDED THAT QUESTIONS AND ANSWERS 21 AND 22 ARE CONTRARY TO LAW AND ENTITLED TO NO JUDICIAL DEFERENCE.

"The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (citations omitted). To be valid, regulations must therefore "be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977).

Numerous rules and guidelines promulgated by the EEOC have been struck down by the courts in reliance upon the basic principles set forth above. As the Court recently stated, the EEOC's " 'interpretation' of the statute cannot supersede the language chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825-26 (1980). *See also, e.g., Gilbert*, 429 U.S. at 141-45; *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973); *Spencer v. Banco Real, S.A.*, 87 F.R.D. 739, 743 (S.D. N.Y. 1980).[40] The weight to be given to any particular EEOC interpretation varies with "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Gilbert*, 429 U.S. at 142 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).[41]

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[40] *Espinoza* is especially apposite to the case at bar. In holding that Title VII did not make it illegal "to discriminate on the basis of citizenship or alienage," the Court stated that deference to EEOC guidelines "must have limits where, as here, application of the guideline would be inconsistent with an obvious Congressional intent not to reach the employment practice in question." 414 U.S. at 94.

[41] The EEOC has no authority to promulgate rules or regulations pursuant to Title VII. *See Gilbert*, 429 U.S. at 141; Albemarle

In *Gilbert*, this Court declined to give deference to a regulation promulgated by the EEOC several years after the enactment of Title VII and without reference to any intervening source of legislative history. 429 U.S. at 140-44.[42] It found that regulation to be other than a contemporaneous interpretation of Title VII and to contradict both the EEOC's more nearly contemporaneous interpretations of Title VII and regulations issued under the Equal Pay Act, 29 U.S.C. § 206(d). 429 U.S. at 140-44. The EEOC's interpretations on the issue involved in this case suffer from these faults and more.

Since it first published its sex discrimination guidelines in 1972, the EEOC has maintained that, regardless of cost, an employer must provide the same level of benefits for female employees as for the spouses of male employees, and the same level of benefits for male employees

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Paper Co. v. Moody, 422 U.S. 405, 431 (1975). Accordingly, EEOC guidelines are no more than the EEOC's opinion of what Title VII means. *See, e.g.*, Ass'n of Am. Railroads v. United States, 603 F.2d 953, 962 (D.C. Cir. 1979). Its Guidelines, therefore, are to be accorded less weight than that given to administrative regulations which Congress has declared shall have the force of law or to regulations which under an enabling statute may themselves supply the basis for imposition of liability. *See Gilbert*, 429 U.S. at 141.

[42] In 1972, the EEOC had taken the following position on the meaning of Title VII:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

37 Fed. Reg. 6836 (1972), *reprinted in* 29 C.F.R. § 1604.10(b) (1975) (Pet. 5 n.2).

as for the spouses of female employees. 29 C.F.R. § 1604.9(d) & (e) (37 Fed. Reg. 6836 (1972)).[43]

In enacting the PDA, Congress expressly rejected the approach of comparing employees and spouses:

> It was suggested before this committee that an effect of title VII, once this bill was enacted, would be to require that if the maternity costs of women employees were paid under a medical plan, the similar costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect. This bill would not mandate that women dependents be compared with woman employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.

S. Rep. No. 331, 95th Cong., 1st Sess. 6 (1977), Leg. Hist. at 43.

Undaunted by this expression of congressional intent, when it published in the Federal Register its "Interim Amendments to Guidelines on Discrimination Because of

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[43] Prior to enactment of the PDA, the Shipyard's Plan complied with these regulations. It provided exactly the same level of pregnancy benefits for its female employees as for the spouses of its male employees. Moreover, it appears that the Shipyard's Plan complies with 29 C.F.R. § 1604.9(d) even today. That regulation, designed solely to protect employees, apparently does not require an employer to provide the same level of benefits for male employees' spouses that it provides for female employees:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

29 C.F.R. § 1604.9(d).

Sex" with "Questions and Answers concerning the Pregnancy Discrimination Act," the EEOC included the following Question and Answer:

> 21. Q. Must an employer provide health insurance for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?
>
> A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.
>
> But the insurance does not have to cover the pregnancy-related conditions of other dependents as long as it excludes the pregnancy-related conditions of the dependents of male and female employees equally.

44 Fed. Reg. 13,280-81 (1979).

When it published its "Final Interpretive Guidelines" and final "Questions and Answers" on the PDA, the EEOC noted that "[a] majority of the comments questioned the appropriateness of the Commission's answer to Question 21 . . . ." 44 Fed. Reg. 23,804 (1979).[44] Despite this criticism, Question and Answer 21 appeared unchanged in the final Questions and Answers. In addition, "to provide additional guidance to interested parties" (44 Fed. Reg. 23,805 (1979)), the EEOC reiterated its position in the following Question and Answer:

> 22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

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[44] The EEOC's Interim Guidelines and Questions and Answers on the PDA became effective on March 9, 1979. 44 Fed. Reg. 13,278 (1979). The EEOC nevertheless solicited comments from the public for a period of 30 days thereafter. 44 Fed. Reg. 13,279 (1979).

> A. No. . . . However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. . . .

44 Fed. Reg. 23,807 (1979).[45]

In explaining its answers to Questions 21 and 22, the EEOC acknowledged that the PDA itself did not address the question of benefits for employees' spouses and that, "The legislative history of the Pregnancy Discrimination Act states explicitly that existing principles of Title VII law would have to be applied to resolve the question of benefits for dependents." 44 Fed. Reg. 23,804 (1979). Thus, it explained, "The Commission, being responsible for interpreting and implementing Title VII, utilized Title VII principles to arrive at the position reached on the dependent question." *Id.* Those "Title VII principles" purportedly were the following:

> The underlying principle of Title VII is that applicants for employment or employees be treated *equally* without regard to their . . . sex . . . . This equality of treatment encompasses the receiving of fringe benefits made available in connection with employment. Title VII does not require employers to provide the same coverage for the pregnancy-related medical conditions of spouses of male employees as it provides for the pregnancy-related costs of its female employees. However, if an employer makes available to female employees insurance which covers the costs of all of the medical conditions of their spouses, but provides male employees with insurance coverage for only *some* of the medical conditions (i.e., all but

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[45] The district court held Questions and Answers 21 and 22 invalid. The court below did not explain its reversal of that decision even though its view appears to be that an employer's medical benefits plan must treat all pregnancies alike, not that such a plan must treat all spouses alike.

> pregnancy-related expenses) of their spouses, male employees are receiving a *less favorable fringe benefit package*. This view was explicitly supported by Senators Bayh and Cranston, 123 Cong. Rec. S15,037, S15,058 (daily ed. Sept. 26, 1977), and not specifically opposed.

44 Fed. Reg. 23,804-05 (1979) (emphasis added).

This explanation ignores entirely this Court's opinion in *Gilbert*, which clearly establishes the only pertinent "Title VII principles." In addition, it presumes too much. First, it presumes that Title VII requires a fringe benefit plan to provide "equal benefits" for employees of both sexes regardless of cost. The EEOC's decision to totally disregard employer costs in assessing the amount of "compensation" an employee receives from a fringe benefit plan is an anomaly. Other agencies charged with the administration of equal employment laws deem fringe benefit plans to be lawful if employer contributions are equal for employees of both sexes.[46]

More importantly, the EEOC's explanation presumes that providing pregnancy-related insurance benefits for male employees' spouses is necessary to ensure "equal"

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[46] Regulations promulgated by the Department of Health and Human Services pursuant to Title IX of the Civil Rights Act, for instance, prohibit a recipient of federal funds from administering a fringe benefit plan "which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex." 45 C.F.R. § 86.56(b)(2). The Department of Labor's Office of Federal Contract Compliance Programs similarly requires either equal contributions or equal benefits. 41 C.F.R. § 60-20.3(c). The regulations issued by the Department of Labor's Wage and Hour Administrator pursuant to the Equal Pay Act are to the same effect. 29 C.F.R. § 800.116(d) ("If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provision will result . . . even though the benefits which accrue to the employees in question are greater for one sex than for the other"). This Court has endorsed the view of the Wage and Hour Administrator. *See Gilbert*, 429 U.S. at 144-45.

fringe benefits for male and female employees. This presumption was rejected in *Gilbert*, 429 U.S. at 139. *See also Satty*, 434 U.S. at 141; *Geduldig v. Aiello*, 417 U.S. 484 (1974). Indeed, it may be argued that an employer which even-handedly covers the health risks incurred by employees' spouses of both sexes and, in addition, provides coverage for the pregnancy-related expenses of the spouses of male employees therby "favors" male employees by providing them with a benefit which is denied to female employees by virtue of the simple fact that their spouses cannot become pregnant.[47]

In any event, what § 703(a)(1) of Title VII prohibits is unequal "compensation." It is readily apparent that a difference in take-home pay, as was present in *Manhart*, represents a difference in "compensation." It is not at all apparent, however, that male employees receive less "compensation" than female employees if the spouses of both are equally covered for all risks under a medical insur-

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[47] In the context of a health insurance plan, it is simply impossible to determine whether male or female employees receive a "less favorable fringe benefit package." For example, the average short-stay in a non-federal hospital for a male is 7.7 days, whereas the average short-stay in a non-federal hospital for a female is 6.9 days. Unpublished data, *National Hospital Discharge Survey*, National Center for Health Statistics, 1981. Accordingly, under the EEOC's "favorable fringe benefit package" analysis, the Shipyard's Plan, by covering the full cost of hospital room charges for employees of both sexes, to a maximum of 120 days, may be said to favor male employees. Moreover, as of November 1982, 66.3% of all married males in the United States over the age of 16, but only 20% of all married females in the United States over the age of 16 had unemployed spouses. *Employment and Earnings*, Bureau of Labor Statistics, Dec. 1982. Thus, using the EEOC's analysis, the Shipyard's Plan, which provides that the medical expenses of a spouse employed elsewhere are covered first by the spouse's medical insurance plan, if any, "favors" male employees.

This analysis shows the absurdity of the EEOC's argument. Taken to its logical end, this analysis would lead to the conclusion that the Shipyard's Plan, by excluding coverage for, *e.g.*, eyeglasses, is unlawful under Title VII, if statistics show that more persons of one sex or the other in fact wear eyeglasses.

ance plan which does not cover the pregnancy-related medical expenses of the male employee's spouse—"an *additional* risk unique to women." *See Gilbert*, 429 U.S. at 139 (emphasis in original). Thus, as this Court noted in *Gilbert*:

> [T]he failure to compensate . . . for [the] risk [of pregnancy] does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other.

429 U.S. at 139-40. *See also Satty*, 434 U.S. at 141 ("No evidence was produced [in *Gilbert*] to suggest that men received more benefits . . . than did women; both men and women were subject generally to the disabilities covered and presumably drew similar amounts from the insurance fund").

In an attempt to support the position set forth in Questions and Answers 21 and 22, the EEOC now argues that the position there taken is mandated, not by "existing Title VII principles," but by the PDA itself. R.Br. 2. This position is flatly contradicted by the EEOC's explanation of those Questions and Answers in the Federal Register, which is the EEOC's more nearly contemporaneous interpretation of the PDA.[48]

As no more than novel and extremely tardy interpretations of Title VII of the Civil Rights Act of 1964, the EEOC's answers to Questions 21 and 22 share the faults

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[48] The Ninth Circuit in *Lockheed* concluded that "EEOC's answer to its Question 21 is not based on a contemporaneous interpretation of PDA but rather on its erroneous view of pre-existing Title VII principles." 680 F.2d at 1246 n.3. The EEOC's answer to Question 22, being in pertinent part a restatement of its answer to Question 21, necessarily shares the same status.

of the EEOC regulation that this Court discounted in *Gilbert*, 429 U.S. at 140-45. First, they obviously cannot command the respect normally accorded to contemporaneous interpretations. *Id.* at 142. Second, they flatly contradict the EEOC's earlier interpretations of Title VII. *Id.* at 143-44.[49] Third, in promulgating Answers 21 and 22 the EEOC inexplicably ignored this Court's decision in *Gilbert* and relied on no new source of legislative history that had been discovered in the 14 years intervening since the enactment of Title VII. *Id.* at 144-45. Fourth, in measuring "compensation" without regard to employer costs, the EEOC differs from other agencies charged with the enforcement of employment-related sex discrimination laws. *Id.* at 145. *See* note 46 *supra*.

Because of the second clause of the PDA, employers who provide medical insurance coverage for their employees now must bear the cost of covering the pregnancy-related medical expenses of their female employees to the same extent that they cover medical expenses of employees generally. By promulgating Questions and Answers 21 and 22, the EEOC seeks to require employers to bear the yet additional cost of covering pregnancy-related medical

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[49] Indeed, for many years the EEOC permitted the denial of pregnancy benefits even to female employees. In late 1966, for example, the General Counsel of the EEOC issued opinion letters stating the EEOC's position to be that "an insurance or other benefit plan may simply exclude maternity as a covered risk, and such exclusion would not . . . be discriminatory." General Counsel Opinion Letter November 1, 1966. E.P.G. (CCH) ¶ 17,304.49. The EEOC affirmed this position in a 1969 decision, CCH EEOC Dec. (1973) ¶ 6084 (Dec. No. 70-360 (1969)), only to summarily reverse itself fifteen months later. CCH EEOC Dec. (1973) ¶ 6221 (Dec. No. 71-14 74 (1971)). *See Gilbert*, 429 U.S. at 143-44.

If any "existing Title VII principles" supported the EEOC's present view of the law, the EEOC surely would be able to point to cases predating the PDA in which that issue was addressed. Significantly, no such cases exist. All pre-PDA cases addressing pregnancy discrimination deal only with the denial of benefits to female employees. That there were many such cases makes the total absence of cases on dependents' pregnancies all the more conspicuous.

expenses of their male employees' spouses to the same extent that they cover medical expenses for employees' spouses generally. The EEOC once correctly acknowledged that this result is not mandated by the PDA. Nor can it be found that this result was mandated by principles of Title VII in existence prior to passage of the PDA—Questions and Answers 21 and 22 are directly contrary to the principles of Title VII set forth in this Court's decision in *Gilbert*. Accordingly, the district court correctly concluded that Questions and Answers 21 and 22 are contrary to law and entitled to no judicial deference.

III. THE DISTRICT COURT CORRECTLY DECIDED TO DISMISS THE EEOC'S COMPLAINT.

The EEOC's complaint alleges that a health insurance plan which limits reimbursable hospital claims for a risk which can be incurred only by a female spouse constitutes discrimination against male employees with respect to their compensation. As noted earlier, the PDA is plainly inapplicable to this allegation.[50] Indeed, as recognized by Judge Wright, specially concurring in *Lockheed*, it is irrelevant that pregnancy benefits are involved at all:

> What we must decide is whether Lockheed denies its male employees a health benefit plan equivalent to that given its female employees and, if so, whether the denial is based on impermissible sex discrimination. For our purposes, it is irrelevant that dependents' pregnancies are the excluded risk. *The exclusion could be breast cancer. Our focus is properly on the effect of the exclusion on the employee because it is his compensation and terms of employment that Title VII protects from unlawful discrimination.*

680 F.2d at 1247 (Wright, J., specially concurring) (emphasis added). Although the question presented is novel, the guiding principles are well-established.

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[50] *See* pp. 10-12, 29-30, *supra*.

The Court has decided three cases involving claims made by female employees that their employers violated § 703(a)(1) by maintaining fringe benefit plans which discriminated against them with respect to their compensation because of their sex—*Manhart*, *Satty*, and *Gilbert*. Two of these cases—*Satty* and *Gilbert*—involved claims that an employer violated § 703(a)(1) by treating pregnancy differently than other medical conditions in a medical benefits plan. The Court rejected both of these claims because, *inter alia*, there was no evidence to support a finding tht the financial benefits of either plan "worked to discriminate against any definable group or class in terms of aggregate risk protection derived by the group or class from the program." *Satty*, 434 U.S. at 144; *Gilbert*, 429 U.S. at 138. *See also Geduldig*, 417 U.S. at 496. However, it upheld the claim made in *Manhart*, which involved a pension plan whereby female employees and male employees received unequal take home pay because their employer, using sex-based mortality tables, required them to make unequal contributions to a pension fund. Applying the principles of *Gilbert*, *Satty*, and *Manhart* to the instant case demonstrates that there is no basis for a finding that the Shipyard's Plan discriminates on the basis of sex with respect to compensation.

The *Manhart* Court emphasized that a fringe benefit plan may be found to be gender-based if it classifies employees into "two groups . . . composed entirely and exclusively of members of the same sex." 435 U.S. at 715. At the same time, it distinguished *Gilbert* by explaining that the employee groups created in that case—pregnant women and all other persons—did not result in a sex-based classification. *Id.* The Shipyard's Plan, like the employee benefit plan at issue in *Gilbert*, divides employees into one group which is all of one sex—in this case, male employees with pregnant spouses who are entitled to benefits under the Shipyard's Plan—and another group which includes employees of both sexes. In this case, the second group includes unmarried male employees, male employees with non-pregnant spouses, married male employees whose

spouses' pregnancy-related hospitalization costs are covered by their own employers,[51] and all female employees. The Plan thus is not facially discriminatory under this method of analysis.

Another method of analysis is suggested in *Gilbert*. The *Gilbert* Court found GE's disability benefits plan to be facially neutral because, "The 'package' going to relevant identifiable groups we are concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'" 429 U.S. at 138-39. In this respect, the Shipyard's Plan is not facially neutral. Because it provides risk protection for pregnancy-related medical expenses, the Plan necessarily covers female employees for a risk that male employees can never incur. It also covers male employees' spouses for a risk that female employees' spouses can never incur. Under this method of analysis, the Plan favors the male employee and his spouse. Only a male employee has the potential of receiving reimbursements for a medical risk peculiar to his spouse. Because of the biological differences between the sexes, the female employee can never be reimbursed for a similar spousal medical risk. Accordingly, the EEOC's position is not furthered by the equal risk protection analysis utilized in *Gilbert*. Nor would its position be assisted materially by this analysis if it had alleged that the Shipyard's Plan discriminates against female employees with respect to their compensation.

The Shipyard's Plan, like most medical insurance packages, "covers some risks, but not others." *See* pp. 2-4 *supra*. *See also Gilbert*, 429 U.S. at 138. It excludes or limits reimbursements for a number of medical risks.

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[51] Under the Shipyard's Plan, expenses incurred by a spouse employed elsewhere are to be paid first by the spouse's group plan, if any. *See* 34a, 47a-48a (App.).

Id. Moreover, no risk is "fully" covered. *See* pp. 2-4, *supra*. Because the Shipyard's Plan limits the extent to which it will reimburse male employees for hospitalization costs incurred by their spouses in the event of pregnancy, the EEOC contends that the Plan discriminates against male employees with respect to their compensation. There simply is no proof of this.

In terms of financial benefits, the Shipyard's Plan is worth different amounts to each employee. A single employee no doubt receives fewer financial benefits from this Plan than a married employee with dependents. Similarly, an employee with an unhealthy family undoubtedly receives greater financial benefits than one with a healthy family. As the Court recognized in *Manhart*, when insurance risks are grouped, the better risks always subsidize the poorer risks:

> Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair.

435 U.S. at 710 (footnote omitted). A healthy employee who never makes a reimbursable claim undoubtedly would rather have a higher wage than the medical insurance provided by the Shipyard's Plan. By giving up that increased wage, he is subsidizing the health costs of employees who utilize the Plan to its fullest extent. It is for this very reason that the Court in *Gilbert* concluded that "it is impossible to find any gender-based discriminatory effect in [such a] scheme simply because women disabled as a result of pregnancy do not receive benefits." 429 U.S. at 138.

The compensation an employee receives from an employer's health insurance plan may be measured in sev-

eral ways. In the context of a pension plan, this Court recognized in *Manhart* that both contributions and financial benefits are "compensation" within the meaning of § 703(a)(1). 435 U.S. at 712 n.23. The Court in *Gilbert* made a similar observation. In rejecting the EEOC's then-current view of Title VII's requirements, the Court endorsed the opinion of the Wage and Hour Administrator that no sex-based difference in compensation would be found to result from the operation of a plan for insurance or similar benefits for employees where either equal contributions are made or equal financial benefits are received. 429 U.S. at 144-45.[52]

Viewed from this perspective, the Shipyard's Plan cannot be found to violate Title VII's prohibition on discrimination with respect to compensation because of sex. Shipyard employees make no contributions to the Plan. Nor does the Shipyard make "contributions" to a third party to obtain health insurance for employees. As a self-insurer, its per capita costs vary solely with the number and amount of reimbursable claims made. In no event can any difference in those per capita costs be construed to be based on the factor of sex.

Nor can any difference in financial benefits be deemed to be based on the factor of sex. Each employee's actual financial benefit from the Plan varies solely with the number of reimbursable claims he or she submits. *See Kimberly-Clark Corp. v. Labor & Industry Review Commission*, 95 Wis. 2d 558, 291 N.W. 2d 584, 23 Empl. Prac. Dec. (CCH) ¶ 30,905 at 15,687-88 (Wis. Ct. App. 1980) (any disparity in compensation resulting from the inclusion of income maintenance for female employees who incur pregnancy-related disabilities is based on the factor of actual disability, not on the factor of sex).

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[52] *See also Manhart*, 435 U.S. at 717-18 ("Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let such retiree purchase the largest benefit which his or her accumulated contributions could command in the open market").

Thus, an employee's "compensation" from the Shipyard's Plan, whether measured by the Shipyard's costs or by the employee's actual receipts, cannot be found to violate Title VII. Both measures of compensation are based solely on the factors of actual illness, injury, or other reimbursable incident.

A third possible measure of the "compensation" derived from the Shipyard's Plan is the "value" of the Plan to the employee. The subjective "value" of the Plan will depend on factors wholly unrelated to sex. A single employee most likely does not want the full range of coverage provided for him by the Shipyard's Plan. If that individual purchased a health insurance policy from an independent insurance company, it is unlikely that he would select the same kind of policy selected by an employee who is responsible for the support of one or more dependents. However, the objective "value" of the Shipyard's Plan is equal for all employees. It is the cost of obtaining a policy identical in scope to the Shipyard's Plan.[53] If this value varies at all, it varies only by the

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[53] *See* Delta Air Lines, Inc. v. Kramarsky, 650 F.2d 1287, 1298 n.16 (2d Cir.), *vacated in part*, 666 F.2d 21 (1981), *prob. jur. noted*, 102 S. Ct. 1968 (1982) ("[B]enefits payable in the future have no present value, being a mere expectancy, contingent upon the occurence of an insured risk. Therefore, in a plan where the employer bears the full cost of providing benefits, the value of the plan is equal to the cost to the worker of purchasing equivalent coverage directly from an insurer"); Benston, *The Economics of Gender Based Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 503 (1982) ("[T]he actual amounts received do not measure the benefit received by an employee who is granted insurance as a fringe benefit. . . . The value of the insurance fringe benefit to employees depends not on its cost to the employer but on its subjective worth to the individual recipient. This is the situation for any compensation not paid in cash. As an initial approximation, the value of a fringe benefit to an employee seems to equal the number of dollars he or she would pay to purchase the same benefit on the open market").

amounts charged by different insurance carriers for identical policies, also a factor other than sex.[54]

In concluding that the Shipyard's Plan "results in less complete medical coverage for male employees with spouses than for female employees with spouses," the court below apparently agreed with the EEOC's theory that unequal "compensation" may be presumed in this case because a male employee "must finance himself some of the expenses resulting from his spouse's disabilities." R.Br. at 7. Under the Shipyard's Plan, a female employee also must pay some of the expenses resulting from her spouse's disabilities. Thus, a female employee whose spouse is in the hospital for over 120 days must pay "some of the expenses resulting from [her] spouse's disabilities." She must pay for all expenses incurred by her spouse as the result of, *inter alia*, oral surgery. Moreover, the risk of incurring out-of-pocket expenses for spouses' pregnancies does not fall on male employees as a class—even those with pregnant spouses likely to be eligible for reimbursements under the Shipyard's Plan may never incur pregnancy-related hospital costs in excess of $500.

Unequal compensation could not be found in this case, moreover, even if male employees alone had to pay some amount in the event of a particular spousal disability. Compensation is what the employee receives from his employer. It has nothing to do with what he must pay

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[54] The employer in *Manhart* argued that requiring equal contributions from its male and female employees would result in an unlawful disparate impact because, as a class, male employees would receive fewer total pension benefits. 435 U.S. at 710-11 n.20. Noting that "each retiree's total pension benefits are ultimately determined by his actual life span," the Court stated that "any differential in benefits paid to men and women in the aggregate is thus 'based on [a] factor other than sex,' and consequently immune from challenge under the Equal Pay Act." *Id. See also County of Washington v. Gunther*, 101 S. Ct. 2242 (1981). The Shipyard submits that the Equal Pay Act, 29 U.S.C. § 206(d), also bars any disparate impact claim in this case.

in particular circumstances. Thus, as the Court explained in *Gilbert*:

> Absent proof of different values, the cost to "insure" against the risk is, in essence, nothing more than extra compensation to the employee, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the "insurance," there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the "extra" disabilities due to pregnancy. While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII, they illogically also suggest that the present scheme does violate Title VII because: "A female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability." Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription of discrimination does not, in either case, require the employer to pay that incremental amount.

429 U.S. at 139 n.17.

The EEOC's argument in this case, like the one rejected in *Gilbert*, is totally illogical. The EEOC expressly sanctions medical insurance plans which do not cover spouses. *See* 29 C.F.R. Part 1604 (App.) (Question and Answer 21). If it is lawful for an employer to maintain a plan whereby a male employee must

pay the full amount in the event of his spouse's pregnancy, it cannot be unlawful for the Shipyard to maintain a plan whereby the male employee *may* have to pay *some* amount. "To hold otherwise would endanger the commonsense notion that an employer who has no . . . [health insurance] program at all does not violate Title VII even though the 'underinclusion' of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon another." *Gilbert*, 429 U.S. at 139-40.

The court below therefore clearly erred in reversing the district court's decision to dismiss the EEOC's complaint. That the EEOC's claim is made on behalf of male employees who claim to have been "affected by pregnancy" cannot alter the fact that no § 703(a)(1) violation may be found absent proof that these male employees have been discriminated against "with respect to [their] compensation." As the EEOC, which alleges only a *per se* violation of § 703(a)(1), has no intention of offering any such proof, the decision to dismiss the complaint was proper in all respects.

CONCLUSION

Based on the foregoing points and authorities, the Shipyard requests that the decision of the court below be reversed.

Respectfully submitted,

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